AUTHORITIES CITED

In the Supreme Court of the United States

OCTOBER TERM, 1925

No. —

FEDERAL TRADE COMMISSION, PETITIONER

v.

AMERICAN TOBACCO COMPANY, RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

The Solicitor General and the Chief Counsel of the Federal Trade Commission, on behalf of the Commission, pray that a writ of certiorari issue to review a judgment of the United States Circuit Court of Appeals for the Second Circuit, entered on the 27th day of October, 1925, which set aside an order of the Federal Trade Commission entered against the American Tobacco Company and others on the 16th day of February, A. D. 1924.

STATEMENT

On the 29th day of May, 1922, the Commission issued a complaint against certain named wholesalers of tobacco, cigars, and cigarettes, members

of an unincorporated association styling themselves Wholesale Tobacco and Cigar Dealers Association of Philadelphia, Pa., and certain of the great tobacco-manufacturing companies, charging the wholesalers, in effect, with combining and conspiring together to fix the prices at which wholesalers in the Philadelphia district should sell tobacco and tobacco products and to prevent wholesalers who did not maintain the prices agreed upon from purchasing goods; and charging the tobacco-manufacturing companies with aiding and abetting the observation of the prices thus fixed, both by members of the association and by nonmembers, by agreeing to refuse and refusing to sell their products to any wholesaler selling at less than the agreed prices. The members of the association and the tobacco companies answered, and after testimony was taken the Commission made its findings and entered an order against the wholesalers and the American Tobacco Company, the complaint being dismissed as against the Lorillard company, which had also been named as a party. The wholesalers reported that they were complying and would continue to comply with the Commission's order, but the American Tobacco Company applied to the Circuit Court of Appeals for the Second Circuit to review the proceedings. In due time the case came on for argument and the court set the Commission's order aside.

THE FACTS

On August 5, 1920, all the wholesale tobacco and cigarette dealers in Philadelphia, Pennsylvania, and Camden, New Jersey, except two, organized an association, the declared purpose of which was "to correct any abuses as may exist in the conduct of the trade by its various members." On September 16, following, the Association adopted a resolution that "cash discounts on tobacco and cigarettes be not more than 8%." (Commission's Exhibit 1.) The Executive Committee was requested to notify all members not in attendance of the discounts adopted by the Association. (Commission's Exhibit 1.) In explanation of this method of fixing prices it should be stated that the large tobacco companies issue price lists on their goods which they distribute to the wholesalers and jobbers and make their own prices to such customers based on a discount from these lists. The jobbers use these same lists in reselling, and their agreement therefore to sell tobacco and cigarettes at 8% off the list fixes a uniform price at which the members would sell tobacco and cigarettes. On June 20, 1921, prices were increased by reducing the discount from list from 8% to 7% (Commission's Exhibits 4 and 5, R. 1236-37.)

Having agreed upon the prices to be charged by the members, the Association cast about for means of compelling members to observe the prices, of inducing and compelling those outside the Associa-

tion to become members and thus become parties to the agreement, and of inducing and compelling wholesalers not members to maintain Association prices. It was apparent that if the great tobacco manufacturing companies, whose products comprised practically all of the tobacco dealt in by the wholesalers, would join with the members of the Association, all three of these ends would be accomplished. By the simple expedient of the manufacturers refusing to sell further to price cutters or to those who did not join the Association, recalcitrants could be brought into line or forced out of business. Accordingly negotiations were entered into by the Association with certain of the large tobacco companies. The Commission found that the "American Tobacco Company knew of the price agreements made by the Association and its members • • • and agreed with the said Association and its members to help them maintain the price agreements" (Rec. 1354).

The Association employed an agent to detect price cutting by members of the Association as well as those not members of the Association. Dealers who would not maintain agreed prices were reported to the American Tobacco Company, who discontinued sales to them until they agreed to maintain prices or definitely and finally declined to sell them further. Murphy Brothers, members of the Association, were reported to the American Tobacco Company, which declined to sell them any

goods from September 2, 1921, to October 4, 1921 (Commission's Exhibit 20, R. 418; Exhibit 21, R. 419). Charles Seider, another wholesaler, was dropped by the American Tobacco Company from its list of customers "for selling merchants in Philadelphia at less than the prices in effect here by this group of jobbers." (R. 693.) Shipments to V. Fermani and one Blumenthal, other price cutters, were also held up by the American Tobacco Company because of reports made to it by officers of the Association upon information furnished to them by their investigator. (R. 696–698.)

The effect of the combination of the Philadelphia jobbers and the American Tobacco Company was to suppress and eliminate price competition among both members of the Association and non-members (R. 131–132, 159–60, 246–248, 250–251, 300–301, 303–311, 313, 374–375). The holding of the Court below is shown by the

QUESTIONS PRESENTED

Paragraph One: Is the Commission's finding that the American Tobacco Company agreed with the members of the Philadelphia Association to decline to sell its products to any jobber who did not maintain the prices agreed upon by the jobbers, supported by evidence? The Court below held that it was not.

Paragraph Two: Was it lawful for the American Tobacco Company, with full knowledge of the illegal agreement of the jobbers to fix prices at

which they would sell and to prevent jobbers who sold at less than these prices from getting the goods, actively to aid and abet the jobbers in making effective their illegal agreement? As we understand the opinion, the Court below held that such action was lawful.

Paragraph Three: Is it an unfair method of competition for the members of a jobbing association to agree to fix prices at which they will sell and to prevent both members of the Association and nonmembers who do not observe the agreed prices from procuring the goods? The Court below appears to be of opinion that it is not.

Paragraph Four: Is it an unfair method of competition for a manufacturer to join with a jobbers' association in compelling its members to observe prices illegally agreed upon and in preventing jobbers who do not observe the price from procuring the manufacturer's goods? The Court below held that it is not.

Paragraph Five: Is it an unfair method of competition for jobbers to sell goods at prices satisfactory to themselves and which in the past have sustained their business, though such prices may be lower than those agreed upon by the members of an association of competing jobbers? The Court held that it is. Conversely, is it fair competition for jobbers to combine to coerce competitors into charging prices which they have agreed upon as satisfactory to themselves? The Court held that it is.

Paragraph Six: May a combination in restraint of interstate commerce in violation of the Sherman Act amount also to an unfair method of competition within the meaning of the Federal Trade Commission Act? The Court appears to be of opinion that the two acts cover entirely different fields.

Paragraph Seven: Must the Commission in each case allege in its complaint that a proceeding is to the interest of the public, introduce evidence to prove the allegation and make a finding of fact that the proceeding is to the interest of the public, as a condition precedent to entering a valid order to cease and desist under the statute? The Court intimates in this case that it must do so, and in a previous case definitely held that it must.

Paragraph Eight: Is it to the interest of the public to prevent jobbers from agreeing upon prices at which they will sell and from agreeing to prevent those who will not observe their prices from getting the goods, even though no evidence be adduced that the increased prices of the jobbers are passed on to the consumer through increased prices of the retailer? The Court below appears to be of opinion that a proceeding for this purpose is not to the interest of the public.

REASONS FOR THE ISSUANCE OF THE WRIT

As the questions above stated show, the opinion of the Court casts doubt upon the construction heretofore entertained of various phases of the Trade

Commission Act, and, in one respect, of the Sherman Law.

The Court set aside the order of the Commission on the ground that there was no evidence to support it. We believe that there was not only substantial evidence to support the finding, but the evidence stated by the Court as adverse to the finding was not necessarily contrary to that upon which the finding was based. As the finding was supported by substantial evidence, the action of the Court was clearly unwarranted and should be reversed.

The Court appears to be of opinion that acts which violate the Sherman Law are not an unfair method of competition. It has been supposed since the decision of this Court in the Gratz and Beech-Nut cases that practices having a dangerous tendency unduly to hinder competition were unfair methods of competition even though their use might also violate the Sherman Law. There was no intimation in the Beech-Nut case that if the use of a system of express contracts between the manufacturer and dealers to maintain resale prices had been admitted, the Beech-Nut Company would not have been guilty of the use of unfair methods of competition. On the contrary, both the opinion of the Court and the dissenting opinion by Justice McReynolds indicate that a violation of the Trade Commission Act would have been proven. The decision in this case is, therefore, it is urged, con-

trary to the decision of the Court in the Beech-Nut case.

Similarly, various Courts of Appeals have held that a combination of jobbers or other dealers to prevent competitors from securing goods by threat of boycott is an unfair method of competition (*National Harness Manufacturers' Association* v. *Federal Trade Commission*, 268 Fed. 705; *Wholesale Grocers Association of El Paso, Texas*, v. *Federal Trade Commission*, 277 Fed. 657; *Western Sugar Refinery Company* v. *Federal Trade Commission*, 275 Fed. 725; *Southern Hardware Jobbers' Association* v. *Federal Trade Commission*, 290 Fed. 773). Certainly such a combination is in violation of the Sherman law (*Eastern States Retail Lumber Dealers' Association* v. *United States*, 234 U. S. 600). The opinion of this Court in the *Federal Trade Commission* v. *Raymond Bros.-Clark Company* (263 U. S. 565), appears to be in accord with these decisions and contrary to that of the Court below in the instant case.

While not expressly holding in this case that the Commission must allege, prove, and find that the proceedings is to the interest of the public, the Court clearly intimates that it must; and in a previous case (*John Bene & Sons, Inc.* v. *Federal Trade Commission*, 299 Fed. 468) the same Court squarely held that there must be allegation and proof of public interest and set aside an order of the Commission on the ground that there was not

proof " of its being to the interest of the public that this proceeding should have been begun or the order complained of made." The Commission has been of opinion since its organization that Section 5 of the Trade Commission Act conferred upon it absolute discretion to determine whether it would institute a proceeding. Nothing in the decisions of this Court in the cases which have come before it has even intimated the contrary.

The decision also indicates, without positively deciding, that the test of public interest is the *direct pecuniary injury* to the purchasing public. This is found in the Court's suggestion that there is no public interest in a proceeding to prevent combinations by jobbers to fix prices at which they will sell, since it is not proven that the increased prices of the jobbers are reflected in the retailers' prices. The suggestion of such a test for public interest in a proceeding under a statute intended to preserve free competition is, we believe, quite novel and legally unsound (*Dr. Miles Medical Co. v. Park & Sons*, 220 U. S. 373).

The Court also appears to be of opinion that a combination between a manufacturer and jobbers handling his goods to fix resale prices would not violate the Sherman Law. The Court distinguishes the case of *Dr. Miles Medical Company* v. *John D. Park & Sons Company*, supra, on the ground that in that case the prices of retailers, as well as wholesalers, were fixed. The Court also distinguishes the instant case from the Beech-Nut case on the same ground.

It is now more than ten years since the Trade Commission was organized and entered upon the administration of the Trade Commission Act and those sections of the Clayton Act which it is charged with enforcing. Questions with respect to procedure as well as those involving the interpretation of the substantive law of the Trade Commission Act, such as those found in the opinion of the Court below, ought to be authoritatively settled by this Court. Moreover, the Second Judicial Circuit includes the City of New York, the greatest commercial center of the country, and many more petitions to set aside orders of the Commission are filed in that circuit than in any other circuit with the exception of the Seventh Circuit which includes Chicago. The decisions of these circuits, therefore, in large measure fix the interpretation of the Act and of the procedure thereunder. Where, as in this case, the decision of these circuits are on important points and appear to be at variance with those of this Court and well-considered opinions of other circuits, they should be reviewed by this Court and the law settled.

WILLIAM D. MITCHELL,
Solicitor General.

BAYARD T. HAINER,
Chief Counsel, Federal Trade Commission.

JANUARY, 1926.

BRIEF

OPINION OF THE CIRCUIT COURT OF APPEALS

The opinion in this case has not yet appeared in the Federal Reporter. It will be found at pages 43–66 of the printed transcript. (R. III.)

GROUNDS OF JURISDICTION

This was a petition to the Circuit Court of Appeals for the Second Circuit to review and set aside an order of the Federal Trade Commission entered under authority of Section 5 of "An Act To create a Federal Trade Commission, to define its powers and duties, and for other purposes" (38 Stat. 717). The jurisdiction of the Court below was invoked under authority of Section 5 of that Act.

The Court below reversed the Commission's order on October 27, 1925. (R. III, p. 67.)

The jurisdiction of this Court is invoked under Section 5 (paragraphs 4 and 5) of the Federal Trade Commission Act (38 Stat. 717), and under Section 240 of the Judicial Code, as amended by the Act of February 13, 1925. (*Federal Trade Commission* v. *Gratz et al.*, 253 U. S. 421.)

ERRORS TO BE URGED

The errors to be urged have been set forth in the petition (*supra*, pp. 5–7).

Members of the Wholesale Association agreed upon prices to be charged by them

It is proven beyond question by the minutes of the wholesalers association that they agreed upon prices to be charged by them and sought, by the means related in the statement of facts (*supra* pp. 3-5), to deprive any wholesaler of tobacco or tobacco products who sold at less than the agreed prices. The Court below, while not directly passing upon this question, apparently concedes it (*infra*, p. 22). If at any time after the formation of the combination or conspiracy of wholesalers the American Tobacco Company became a party thereto, or assisted in furthering its purposes, the Commission's order against it was well founded.

> If the unlawful acts were in pursuance of a conspiracy, and were committed before the unlawful conspiracy had been abandoned, or the object of the conspiracy completed, all persons who were members of the conspiracy or made themselves parties thereto at any time before the conspiracy had been abandoned, or its object completed, are responsible. (*United Mine Workers* v. *Coronado Coal Company*, 258 Fed. 829, 838; in support citing *Thomas* v. *U. S.*, 156 Fed. 897, 910; *Smith* v. *U. S.*, 157 Fed. 721, 728; *Goldfield Consolidated Mines Co.* v. *Goldfield Miners Union*, 159 Fed. 524.)
>
> In other words, where an unlawful end is sought to be effected, and two or more persons, actuated by the common purpose of accomplishing that end, work together, in any way, in furtherance of the unlawful

scheme, every one of said persons becomes a member of the conspiracy, although the part he was to take therein was a subordinate one, or was to be executed at a remote distance from the other conspirators. (*U. S. v. Cassidy*, 67 Fed. 698-702. See also *Eastman Kodak Co. v. Blackmore*, 277 Fed. 694.)

The Commission's finding that the Tobacco company agreed to help the members of the association to enforce their price agreement, thereby becoming a party to the conspiracy, as well as its finding of cooperation between the American Company and the association to maintain the agreed prices, is supported by substantial evidence.

As to the American Tobacco Company, there are involved under the complaint and the Commission's findings essentially two propositions, as follows:

(1) An agreement by the American Tobacco Company with the group of jobbers named in the complaint to assist in the maintenance of such resale prices.

(2) Cooperation by the American Tobacco Company with this group of jobbers in maintaining resale prices fixed by said jobbers.

The Commission found that the American Tobacco Company knew of the price agreements made by the Association with its members and agreed with the said Association to help them to maintain their price agreements. (R. p. 1354.) This finding

is amply supported by the testimony. The president and treasurer, respectively, of the Jobbers' Association, shortly after the said Association fixed a uniform resale price, went to New York for the purpose of securing the assistance of the American Tobacco Company in the maintenance of the uniform prices. (R. 654.) The following portions of the record, which quote the testimony of Mr. Hill, justify, we submit, the finding of the Commission that the American Tobacco Company agreed with the Association to help it maintain its discounts:

> Q. Did you say, however, to Mr. Eberbach and to Mr. Krull, or to either one of them, that you would assist them and other Philadelphia jobbers so that they may be selling under a discount satisfactory to them?
>
> A. I don't know just what form that took.
>
> Q. Now tell us what you did say to them.
>
> A. I can not tell, of course, what I did say, but I probably said that we would cooperate with the jobber not being able to sell goods at a profit. (R. 778–779.)
>
> * * * * *
>
> Q. And after your circular, and after your instructions were issued to your field men, did you tell jobbers who visited you that you would cooperate with them in seeing to it that they would be able to sell at the discounts prevailing in their territory?
>
> A. I think the conversation usually took that form, that we would be glad to help you to maintain——
>
> Q. The customary price?

A. No; a satisfactory condition. (R. pp. 779–80.)

Q. So, continuing to be specific, did not you say to Mr. Eberbach and to Mr. Krull, or to either of them, that you would assist them, or cooperate with them, in selling at a discount of not greater than eight per cent?

A. I certainly did not.

Q. What did you say?

A. The most—of course, I am not repeating recollection of a conversation—but the most that I said to either of those gentlemen, or anyone else, was that we would assist them in securing a satisfactory profit on the goods.

Q. Now, the word "satisfactory" is the one word we seem to be at odds about. When you use the word "satisfactory," do you mean satisfactory to the jobber?

A. Satisfactory to the American Tobacco Company.

Q. What do you say as to the jobber?

A. If it is satisfactory to the American Tobacco Company, it is satisfactory to the jobber. (R. pp. 781–82.)

While there is abundant testimony from which it is proper to draw the conclusion that the American Tobacco Company did agree to help the Association maintain its discounts, this proof, we submit, makes it quite unnecessary to point out the numerous places in the record which themselves would justify the finding as to the agreement. The evidence of cooperation between the Company and

the Association stated below contains circumstantial evidence which would fully justify a finding of combination and agreement if there were no direct evidence to sustain it.

The evidence at least establishes conscious cooperation and concert of action between the American Tobacco Co. and the Association to maintain the agreed prices and to prevent any jobbers who cut these prices from purchasing the Tobacco Company's products

So much for the agreement found by the Commission to have been made between the Association and the American Tobacco Company. This leaves the other of the two essential propositions involved as to the Company, viz, its cooperation with the Association in the maintenance of the Association's discounts.

If the evidence does not support a finding of agreement on the part of the tobacco company to aid and abet the members of the Association in carrying out their price agreement by cutting off jobbers who did not maintain the prices, it establishes cooperation and concert of action between the tobacco company and the jobbers to accomplish this purpose, which brings the Company conduct within the decision of this court in the Beech-Nut case. There it was expressly stipulated that there were no contracts, express or implied, which bound the dealers to maintain the prices on Beech-Nut products, made by the Company. This Court

nevertheless held that there was conscious cooperation and concert of action between the Company and dealers handling its products to prevent dealers who did not observe these prices from procuring the goods and that such cooperative methods, having the effect to substantially lessen competition, violated the Trade Commission Act.

The Commission found that the members of the Association:

> Sought and secured the cooperation of the American Tobacco Company in such persuasion and intimidation, which said American Tobacco Company rendered by notifying its trade in the territory of the members, by circular letters and otherwise, that the notifier would refuse to furnish further supplies of its products to any wholesale dealer who failed to resell such products at the prices fixed in the aforesaid letter or implying the same in veiled language.
>
> Caused reports of the names of said dealers who failed to maintain said resale prices to be reported by the members and their salesmen, either directly to the association or through the respective members, in each instance, to the association, and, upon receiving such reports, in turn reported the names of such offending dealers to the American Tobacco Company, requesting its assistance in the enforcement of said system by having said American Tobacco Company refuse to further supply said offending dealers with any of its products. • • •

> Said American Tobacco Company knew of the price agreements made between association and its members * * * and agreed with the said association and its members to help them maintain the price agreements described in Paragraph Two hereof. (R. 1352-1354.)

The evidence supports these findings.

Shortly after the Philadelphia Association established the uniform discounts, the American Tobacco Company issued a circular letter (Com. Ex. No. 10, R. 1241). It was, in effect, a threat to remove price-cutting distributors from its direct list. Tobacco products are sold to the retail trade, and have been sold for many years, at different discounts in various sections of the country. The prevailing discount in one territory is not the same as in other territories; consequently, the circular of the Company meant that the Company would consider as a price-cutter any of its distributors who sold at a higher rate of discount than was generally prevailing in his territory. There were, of course, many sections of the country where there was no prevailing discount; consequently the circular had a different application to territories where there was a prevailing rate of discount from that which it had to territories where there was no discount that was looked upon as the customary discount. As to those where there was a prevailing discount, the circular meant that the Company would consider as a price-cutter anyone who cut

below the prevailing discount. This meant that no matter how these prevailing rates of discounts had been established, even though they might have been established by price-fixing agreements among the jobbers, such as in Philadelphia, the American Tobacco Company would assist in the maintenance of these discounts. As to territories where there was no discount which might be looked upon as the customary or prevailing discount, the circular was an invitation to distributors of the American Tobacco Company to fix customary or prevailing discounts, which when fixed would be enforced by the Company.

The circular was the open announcement of the policy which had been previously decided upon by the Company. This is evident from a letter written by the vice president of the Company to a jobber in Minneapolis (R. 1263–1264) as follows:

> We feel very definitely here, that when jobbers have cooperated and have held such conferences as Mr. Hill has suggested, then the manufacturers can step in by refusing shipments or withholding orders from the demoralizers, and thereby assist those legitimate jobbers who desire to make a profit.

O'Boyle, Field Sales Manager of the American Tobacco Company for the Philadelphia territory, testified that parts of this letter described the relation of his company to the activities of the Philadelphia jobbers. He says:

> However, if any such conferences were held and it was agreed that the merchandise

> should be sold at a price, then the last part of this letter was the policy in effect: "then the manufacturers can step in by refusing shipments or withholding orders from the demoralizers, and thereby assist those legitimate jobbers who desire to make a profit." (Rec. p. 692.)

This cooperation was of the most thorough and effective nature. The Association employed an investigator whose duty it was to find out if any of its members were cutting prices. This investigator reported to the president of the Association, who, in turn, entered complaints with the American Tobacco Company. These complaints were thereupon investigated by the Company, and the record shows, and the Commission found, two outstanding instances of the cooperation charged in the complaint between the Company and the Association. One of these was the cutting off by the American Tobacco Company from its direct list of Charles Seider, who had refused to join the Association and who had refused to maintain its discounts. The proof is direct, positive, and convincing that Seider was cut off by the American Tobacco Company solely because he sold at prices less than those agreed upon by the Association, although the discounts which he was then allowing were no greater than those he had been allowing for thirty years or more. The other outstanding instance is the cutting off by the American Tobacco Company of Murphy Brothers. They also were

cutting prices, and they, as well as Seider, after having been complained against by the Association to the Company, were investigated by the American Tobacco Company. The result of the investigation showed that Murphy Brothers were selling at discounts greater than those fixed by the Association, and the American Tobacco Company removed Murphy Brothers from its direct list.

Two other jobbers, both members of the Association, were suspected of cutting prices, but the charge was not established. While they were not permanently cut off by the American Tobacco Company, their shipments of that Company's goods were delayed. This delay was in the nature of a warning to those jobbers to cease price-cutting, and the record shows that those jobbers heeded the warning.

It appears that the Court admits these facts as it says in the opinion:

> It [The American Tobacco Co.] simply would not sell to any wholesaler or jobber in the Philadelphia territory if it found that he was selling to the retailer at a price less than that fixed by the Wholesale Tobacco and Cigar Dealers Association of Philadelphia * * *
>
> In other words its policy was to uphold and support the prices of its products as fixed in a particular locality by the wholesalers or jobbers therein.

These statements by the Court necessarily imply knowledge of an illegal agreement to fix prices.

This is not a case where a manufacturer himself suggests resale prices, which he has a lawful right to do, and upon learning that a dealer does not maintain those prices declines to sell him further. Here the jobbers, clearly in violation of the Sherman Law, agree upon prices at which they will sell, and the American Tobacco Company, being fully advised of that agreement and being charged with knowledge of its illegality, nevertheless aids and abets its performance.

The combination of the wholesalers to fix prices at which they will sell and to prevent, through concert of action with the American Tobacco Company, competing wholesalers who did not observe those prices, from securing goods was an unfair method of competition.

It is submitted that both the agreement among the wholesalers to fix prices and their action to prevent competitors who did not observe the prices from buying goods amounted to unfair methods of competition.

In the Gratz and Beech-Nut cases (*F. T. C. v. Gratz*, 253 U. S. 421; *F. T. C. v. Beech-Nut Packing Co.*, 257 U. S. 441) this court held that practices which have a dangerous tendency unduly to hinder competition are unfair. In the latter case it was urged that the Beech-Nut Company's cooperation with dealers to fix resale prices could not be an unfair method of competition since it did not adversely affect competing manufacturers. But this Court held the methods employed to be unfair, be-

cause of their effect to eliminate competition between retail dealers. It is contended, therefore, that methods of competition which are unfair to the public because of their effect to suppress competition are within the prohibition of the Act. A combination among wholesalers to fix prices is certainly a method of competition, and because of its effect to eliminate competition is unfair.

That a combination of jobbers to compel other jobbers against their will to maintain prices fixed by their competitors on pain of having their supplies of goods cut off is an unfair method of competition would appear to be beyond question. It places a direct restraint upon competitors' freedom to trade as they will, to make such prices in their business as may be satisfactory to them and as may be justified by their cost of doing business and by other conditions surrounding their business. Combinations to prevent dealers who do not maintain prices satisfactory to their competitors from procuring goods, by threatening boycott of manufacturers who sell to them, have repeatedly been held to be unfair methods of competition within the meaning of the Federal Trade Commission Act. (*National Harness Manufacturers Association* v. *F. T. C.*, 268 Fed. 705; *Western Sugar Refinery Company* v. *F. T. C.*, 275 Fed. 725; *Wholesale Grocers Association of El Paso, Texas*, v. *F. T. C.*, 277 Fed. 657; *Southern Hardware Jobbers Ass'n* v. *F. T. C.*, 280 Fed. 773; *F. T. C.* v. *Raymond Bros.-Clark Co.*, 263 U. S. 565.)

If, instead of employing the boycott to prevent manufacturers from selling to objectionable wholesalers a combination is formed with the manufacturers by which they become active participants in a conspiracy to compel wholesalers to maintain prices or be deprived of the goods, it would appear just as clearly a direct restraint upon the wholesalers' trade and an unfair method of competition.

While a manufacturer is not a competitor of the wholesaler handling his goods, it is submitted that where a manufacturer becomes a party to a combination of wholesalers and acts in concert with them to coerce the competitors of the wholesalers to maintain prices satisfactory to the combination, he is chargeable with the use of unfair methods of competition both against the wholesalers whose trade is restrained and against the public who is entitled to free and fair competition.

It is no defense of the conduct of either the manufacturer or of the dealers that they believed it to be to their advantage to enter the combination. In the Miles Medical case (*Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U. S. 373, 407) this Court says:

> If there be an advantage to a manufacturer in the maintenance of fixed retail prices, the question remains whether it is one which he is entitled to secure by agreements restricting the freedom of trade on the part of dealers who own what they sell. As to this, the complainant can fare no better with its plan of identical contracts than

could the dealers themselves if they formed a combination and endeavored to establish the same restrictions, and thus to achieve the same result, by agreement with each other. If the immediate advantage they would thus obtain would not be sufficient to sustain such a direct agreement, the asserted ulterior benefit to the complainant can not be regarded as sufficient to support its system.

But agreements or combinations between dealers, having for their sole purpose the destruction of competition and the fixing of prices, are injurious to the public interest and void. They are not saved by the advantages which the participants expect to derive from the enhanced price to the consumer.

It is not an unfair method of competition for jobbers to sell goods at prices satisfactory to themselves, though these prices may be lower than their competitors may desire.

It would appear to be the essence of fair competition that each wholesaler should be permitted to sell goods at such prices as in his judgment will best advance his business. If a wholesaler has lower cost of doing business than his competitors, due to facts peculiar to his own business, such as advantageous investment in plant, favorable location, efficient management and organization, he is entitled to seek to increase his volume of business and further reduce his costs by making lower prices than can be made by others less efficient or in other re-

spects less fortunate. The public also, it would appear, is entitled to have the benefit of such lower prices as the wholesaler is willing to make. In the instant case the wholesalers who were cut off or compelled to charge the prices agreed upon by the members of the Association had been in business for years and had survived upon prices made by them. There is no evidence in the record to show that their prices would not show them a profit, or that they were seeking to destroy competition by selling at less than cost. This was not a case of predatory price-cutting to destroy competition. As a matter of fact, they were the less important wholesalers and were not financially capable of undertaking any such price-cutting campaign. On the other hand, it affirmatively appears that the associated jobbers were demanding that they charge such prices as would insure not themselvse but their competitors what those competitors considered "a fair or legitimate profit" or "a fair and reasonable profit." Does the Court below mean that in a given case it will determine what is a fair and reasonable profit and whether a dealer is reducing prices to a point that does not show such a profit to his competitor? We had not supposed that the Courts would or could do this, since it would require them to determine what prices are reasonable and is tantamount to fixing prices. This we understood from the decisions, the Courts did

not assume to do. In *U. S.* v. *Addyston Pipe and Steel Co.* (85 Fed. 271, 283), Judge Taft says:

> It is true that there are some cases in which the courts, mistaking, as we conceive, the proper limits of the relaxation of the rules for determining the unreasonableness of restraints of trade, have set sail on a sea of doubt, and have assumed the power to say, in respect to contracts which have no other purpose and no other consideration on either side than the mutual restraint of the parties, how much restraint of competition is in the public interest and how much is not.

Upon reaching this Court the case was affirmed, this Court saying:

> We do not think the issue an important one, because, already stated, we do not think that at common law there is any question of reasonableness open to the courts with reference to such a contract (175 U. S. 211, 238).

Again in *Park and Sons* v. *Hartman* (153 Fed. 24, 45), Judge Lurton says:

> It is not answer to such restrictive covenants that after all they only prevent injurious competition between such dealers and only result in maintenance of reasonable prices. These are not the tests by which the validity of such agreements are determined.

Or, if the Court does not claim the right to make this determination, will it leave it to the traders to determine, in combination and agreement, what

prices are reasonable? We had supposed that this was clearly unlawful and that in law a reasonable price was such a price as could be had in free and fair competition in an open market. And yet the question of reasonable profit must be determined either by the Court or by the parties if the dealer is to be held as for unfair competition when he sells at prices which do not show his competitors a "fair and legitimate profit." If, as we believe, every dealer had the right to sell at prices satisfactory to himself, barring illegal discrimination in such prices, then it is clear that competitors can not lawfully combine among themselves and with manufacturers to coerce dealers to sell at prices satisfactory to others.

But the Court seeks to sustain its position in this regard and to escape from the reasoning of the decisions which we have cited by asserting that the Trade Commission is not authorized to determine whether the Sherman Law has been violated. The Court says:

> The question here is not whether what has been done by the American Tobacco Company constituted a restraint of interstate commerce contrary to the Sherman Law and therefore unlawful. The Federal Trade Commission is not clothed with jurisdiction to hear and determine that question in this proceeding, although clothed with a limited jurisdiction as respects alleged violations of Antitrust Acts, Sections 6–10 of the Federal Trade Commission Acts. Its authority to

make the order which it entered herein is restricted to matters of "unfair competition."

Passing the Court's misquotation of the statute by using the term "unfair competition" for "unfair methods of competition," which in itself might lead to erroneous conclusions, we contend that the same acts or practices may constitute a violation of the Sherman Law and an unfair method of competition within the prohibition of the Trade Commission Act. Perhaps every violation of the Sherman Law is not an unfair method of competition. But we had supposed that those restraints of trade which this Court denominates in the Patten case (*U. S. v. Patten*, 226 U. S. 525, 541) as "involuntary" restraint of trade, i. e., direct restraints upon the trade of others against their will, were unquestionably unfair methods of competition. The parties are competitors—if this is indispensibly necessary to the use of an unfair method of competition under the Trade Commission Act, which appears to be doubtful—a direct restraint is placed upon the competition of those against whom the combination is directed, and, in the instant case, all price competition in interstate commerce, in a great interstate territory in the commodity affected, is eliminated. What more can be necessary under the decisions of this Court in the Gratz and Beech-Nut cases, supra, to establish an unfair method of competition. The fact that the same acts may restrain trade in violation of the Sherman Act, does not, we submit, take them out of the Trade Commission Act. In the

Gratz case this Court says that the Trade Commission Act includes practices which have a dangerous tendency unduly to hinder competition. In the Beech-Nut case this Court said:

> The Sherman Act is not involved here except in so far as it shows a declaration of public policy to be considered in determining what are unfair methods of competition. (257 U. S. 441, 453.)

It would appear therefore that the test of unfairness under the Trade Commission Act is of the same general character as that which must be applied to determine whether there has been a violation of the Sherman Law, though differing in degree under the two Acts. Under the Sherman Law an undue or unreasonable restraint of trade must have been accomplished or must have been threatened. Under the Trade Commission Act the methods are unlawful because of their "dangerous tendency unduly to hinder competition." If, in a proceeding under the Trade Commission Act, it be proven that the effect of the methods employed has been to restrain trade within the meaning of the Sherman Law, it is submitted that the Commission has not put itself out of court by proving too much.

Whether there is sufficient public interest to move the Commission to file a complaint is for the Commission to determine under the Act and its decision in that regard is not reviewable by the Court

In the instant case the Court appears to assume that it can set aside an order of the Commission

on the ground that it was not to the interest of the public that the Commission institute a proceeding. In the Bené case (*supra*, page 9), it squarely held that the order of the Commission was void because it was not to the interest of the public that the proceeding should have been begun. We submit that this construction of the Act is erroneous.

We contend that if the Commission in a given case erroneously determines, after hearing, that methods of competition are unfair within the meaning of the Act, the proper Court may set aside the order based upon such determination. But if the Court finds in a given case that the method of competition prohibited by the Commission's order is unfair *within the meaning of the Act*, it should not set aside an order on the ground that the Commission should not have heard the matter.

The wording of the Act is "if it shall appear to the Commission that a proceeding by it in respect thereof would be to the interest of the public." If the words "to the Commission" had been omitted there might have been room for the contention that the Commission's discretion in the matter was not absolute; but the insertion of these words appear beyond question to put absolute discretion in the Commission.

A recent decision in point is that of the Circuit Court of Appeals for the Ninth Circuit in *Hills Brothers* v. *Federal Trade Commission* (decided January 4, 1926), in which the Court said:

> The complaint in this case recites that the commission, in filing the complaint and

making the charges, was acting in the public interest, pursuant to the provision of the Act of Congress, but there was no other or further finding upon that question, and because of the absence of such finding the petitioner contends that the order is erroneous and cannot be sustained. We cannot agree with this contention. An examination of the statute shows very clearly that the question whether a proceeding by the commission in respect thereof would be to the interest of the public, like the question whether the commission has reason to believe that any person, partnership, or corporation has been or is using any unfair method of competition in commerce, is committed to the discretion of the commission, is to be determined by the commission before proceedings are instituted and is not thereafter a subject of controversy either before the commission or before the court, except in so far as the question of public interest is necessarily involved in the merits of the case. And, if the commission finds that the method of competition in question is prohibited by the Act, no other or further finding on the question of public interest is required. (*People* v. *Ballard*, 134 N. Y. 269.) The petitioner cites *John Bené & Sons* v. *Federal Trade Commission* (299 Fed. 468), in support of its contention, but the decision in that case was based on the testimony, not upon the absence of a finding that the proceeding was to the interest of the public. True, the court called attention to the fact that

> there was no finding to the effect that the proceeding was to the interest of the public, but we do not understand that the court intended to hold that such a finding was necessary. A finding that the method of competition employed was prohibited by the Act, covers and includes the question of public interest and no specific finding on that question is requisite or necessary.

It is interesting to note also that decisions of the highest court of New York construing a statute of that State, almost identical in verbiage to the Trade Commission Act, fully support the Commission's contentions here, and in reason and logic are sound. The decisions referred to construe a provision of Sec. 1808 of the Code of Civil Procedure of New York (now Section 304 of the General Corporation Law) which provides:

> Where the Attorney General has good reason to believe that an action can be maintained in behalf of the people of the state • • • he must bring an action accordingly or apply to a competent court for leave to bring an action as the case requires; if, in his opinion, the public interests require that an action should be brought.

In *People* v. *Lowe* (117 N. Y. 174) the Court of Appeals of New York said, respecting the power of the Attorney General under this provision:

> He is to determine in the first instance whether the public interests require an action to be brought and he may act upon his determination, subject to no control.

Again in *People* v. *Ballard* (134 N. Y. 269) the same court said, respecting this provision:

> We think that the question as to what the public interests require is committed to the absolute discretion of the Attorney General and that it can not be made the subject of inquiry by the courts.

So to construe the Trade Commission Act is merely to authorize the Commission to determine whether it will proceed; and to remove the possibility that if it should determine not to proceed it may be compelled by mandamus to do so.

The court probably have reached the result which it did in the Bene case by resting its opinion upon a different ground. It would have been competent for the Court in that case to have held that the practice was of such a character that it was inconceivable that Congress intended to reach it in a public preventaive statute. In other words, that it was not an unfair method of competition within the meaning of the Act. Certainly the method there attacked—disparagement of a competitor's goods—spent its force upon a single competitor, affected the purchasing public remotely and perhaps was, in its nature, more nearly a private than a public wrong. If the Court had rested its decision upon this ground, no complaint could have been made. But when it set aside the Commission's order on the ground, not that the method was not unfair but that the Commission ought not to have instituted the proceeding, it invaded the province of a coordinate branch of the Government.

If the Trade Commission Act be construed as vesting absolute discretion in the Commission to determine whether it shall proceed in a given case, it is constitutional.

It was constitutional for Congress to repose in the Commission uncontrolled power to make the administrative finding of fact which would call the law into action. This Court has repeatedly held that it is competent for Congress to fix the law, to provide that it shall be suspended or called into operation upon the existence of a certain fact or facts, and to provide that the Executive or other administrative officer or body shall conclusively determine the existence of the fact or facts. Perhaps the most striking instance of this is found in *Field* v. *Clark* (143 U. S. 649), where it was held that it was constitutional for Congress to provide that the President might suspend by proclamation the free introduction into this country of sugar, molasses, and other named products when he is satisfied that any country producing such articles imposes duties or other exactions upon the agricultural or other products of the United States, *which he may deem to be reciprocally* unequal or unreasonable. Decisions in many cases put the point beyond controversy. (*Buttfield* v. *Stranahan*, 192 U. S. 470, 496; *Union Bridge Co.* v. *U. S.*, 204 U. S. 364, 383; *Houston* v. *St. Louis Packing Co.*, 249 U. S. 479, 484; *Mitchell Coal & Coke Co.* v. *Penn. Ry. Co.*, 230 U. S. 247,

257; *Mfgrs. Ry. Co.* v. *U. S.*, 246 U. S. 457, 482.) In the case last cited the Supreme Court says:

> It may be conceded that the evidence would have warranted a different finding; indeed the first report of the Commission was to the contrary; but to annul the Commission's order on this ground would be to substitute the judgment of a court for the judgment of the Commission *upon a matter purely administrative*, and this can not be done.

If the question of the presence of public interest is for the Court, the test suggested by the Court below is erroneous.

If it was competent under the statute for the Court to set aside the Commission's order because it was not to the public interest that a proceeding should have been begun, the test of public interest suggested by the Court in this case is unsound. The suggestion that it is not to the interest of the public to prevent agreements between wholesalers fixing prices at which they will sell commodities is startling. On the Miles Medical Case, supra, the Court said:

> But agreements or combinations between dealers, having for their sole purpose the destructions of competition and the fixing of prices, are injurious to the public interest and void.

The Court appears to be of opinion that if retailers were included in the combination it would be to the interest of the public to suppress its

activities. Presumably the basis of the Court's suggestion with respect to want of public interest is the absence of proof that the increased prices of the wholesalers are reflected in the retailers' prices and therefore passed on to the consuming public. But no such proof of direct pecuniary injury to the public should, it is submitted, be necessary to show public interest. If preventing direct restraint of trade is not to the public interest, how shall we explain the legislative policy represented in the Sherman Law and its amendments, the Clayton Act, the Trade Commission Act, and in anti-trust laws in nearly all of the States of the Union. We had supposed that when the Trade Commission issued a complaint charging that a combination of manufacturers or dealers had been fixing prices, public interest in the proceeding would have been beyond question. Proof that the public paid higher prices as the result of such combinations was, we supposed, wholly unnecessary. The rule is so well established under the Sherman Law that citations of authority are not needed. Nothing in the decisions of this Court under the Trade Commission Act appears to change this rule.

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